Great Southern Construction, Inc. *and* Operating Engineers Locals 101 & 627, International Union of Operating Engineers, AFL-CIO; Pipeliners Local Union 798, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; Laborers International Union of North America, Local 1290, AFL-CIO *and* Pipeliners Local No. 798, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada

Off-Shore Drilling & Allied Workers, National Maritime Union of America, AFL-CIO *and* Operating Engineers Local 101 & 627, International Union of Operating Engineers, AFL-CIO; Pipeliners Local Union 798-United Association, AFL-CIO; Laborers International Union of North America, Local 1290, AFL-CIO. Cases 17-CA-10274-1, 17-CA-10274-2, 17-CA-10306, and 17-CB-2416

March 7, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND ZIMMERMAN

On April 16, 1982, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, Off-Shore Drilling & Allied Workers, National Maritime Union of America, AFL-CIO, herein called Respondent Union, filed exceptions and a supporting brief, and the General Counsel filed an answering brief. On August 27 and 30, 1982, the General Counsel and Respondent Union filed supplemental briefs to discuss the impact of the Board's recent Decision in *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB 955 (1982), on the instant case.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that under *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945), Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by recognizing and executing a collective-bargaining agreement with Respondent Union, and that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by accepting such recognition and executing the collective-bargaining agreement. We find on the basis of our recent decision in *Bruckner, supra*, that Respondents did not violate the Act by entering into and executing a collective-bargaining agreement.

The pertinent facts are fully set forth in the Administrative Law Judge's Decision. As of February 21, 1981,[1] 51 of Respondent Employer's 60 to 65 construction employees had signed union authorization cards authorizing the Unions to act jointly as their collective-bargaining representative.[2] On this date, the Unions made a demand for recognition and bargaining to Respondent Employer's general manager, Hurschel Carey. Carey examined the cards, acknowledged that they represented a majority of the employees, but declined to recognize the Union, saying he did not have such authority and that they would have to talk to the company president, B. F. Sadler. Later that day, Union Representative Gerald Ellis telephoned Sadler and demanded recognition and bargaining. Sadler refused citing his deep-seated hatred for Pipeliners Local 798 and the lack of approval by his backer, the Getty Oil Company. Nevertheless, Sadler agreed to meet with the Unions on February 25.

At the meeting held on February 25, Sadler refused the Unions' request for bargaining. In response to Sadler's refusal to bargain, the Unions threatened economic action and stated that they would file unfair labor practice charges against Respondent Employer. Sadler stated that he did not intend to sign any agreement or recognize any union. Thereafter, the Unions set up picket lines.

Later that day Sadler sent a mailgram to Ellis in which he stated, *inter alia*, that: (1) Respondent Employer doubted that a majority of the employees had selected the Unions as their exclusive collective-bargaining representative; (2) neither Manager Carey nor any other company official had examined the authorization cards and that no authorized official had acknowledged that the Unions represented a majority of the employees on February 21; and (3) the Unions should petition for a Board-conducted election if they wished to establish majority status. No petition was filed by the Unions.

On March 3, Respondent Employer recognized Respondent Union as the exclusive collective-bargaining representative of its construction employees pursuant to a card check of authorization cards

[1] All dates herein are 1981 unless otherwise noted.

[2] The Unions were Operating Engineers Locals 101 and 627, International Union of Operating Engineers, AFL-CIO, Pipeliners Local Union 798, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and Laborers International Union of North America Local 1290, AFL-CIO.

by neutral parties.[3] On March 7 Respondent Employer and Respondent Union entered into a collective-bargaining agreement which included, *inter alia*, a union-security clause and a provision providing for checkoff of initiation fees and dues.

As noted above, the Administrative Law Judge found that by the above conduct Respondent Employer and Respondent Union violated the Act under the doctrine of *Midwest Piping, supra*. However, the Board has reevaluated its experience with the *Midwest Piping* doctrine and has determined that a new policy with respect to the requirements of employer neutrality in "initial organizing situations" is warranted. Thus, the Board will no longer find 8(a)(2) violations in rival-union initial organizing situations where an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board. The Board noted that this holding would not preclude the finding of an 8(a)(2) violation where the employer recognized a labor organization which did not actually enjoy majority support.

Applying these principles to the instant case, it is clear that the General Counsel has failed to establish that Respondents have committed any violations of the Act. At the outset we note that no union filed a valid representation petition with the Board, which otherwise would have triggered the imposition of strict employer neutrality.[4]

The General Counsel, however, argues that even under *Bruckner* a violation should be found because the record is devoid of any evidence establishing that Respondent Union enjoyed majority support.[5]

In this regard, the General Counsel stresses that the Administrative Law Judge specifically found that the record does not establish that Respondent Employer recognized Respondent Union based upon a showing that a majority of the employees had designated Respondent Union as their bargaining representative. Alternatively, the General Counsel argues that, even if Respondent Union enjoyed majority support, such support was achieved after the Unions had demonstrated to Respondent Employer that a majority of its employees supported them. We reject the General Counsel's arguments. First, the parties stipulated that Respondent Employer granted recognition to Respondent Union on the basis of a card check by neutral parties. The General Counsel refused to stipulate specifically that the card check revealed Respondent Union represented a majority of the unit employees. It is on the basis of this refusal to stipulate rather than on any affirmative evidence that the Administrative Law Judge found no record support for the majority status of Respondent Union. Further, the General Counsel presented no evidence of coercion or unlawful employer assistance or support of Respondent Union. In the absence of evidence to the contrary, we find that Respondent Employer granted recognition to a labor organization with an uncoerced, unassisted majority.

With respect to the General Counsel's alternative argument, it is clear that Respondent Employer had no obligation of neutrality and therefore was free to recognize whichever of the two Unions it deemed represented a majority of its unit employees. True, the Board, in *Bruckner*, cautioned that the safe course for an employer faced with rival claims of majority support would be to refuse recognition. However, this was addressed to the employer's risk of violating Section 8(a)(2) by recognizing a union which did not in fact enjoy majority support. As noted above, there is no evidence that Respondent Union did not have majority status. Thus, Respondent Employer properly recognized the labor organization it perceived represented a majority of its employees.

On the basis of the foregoing, we find that Respondent Employer and Respondent Union did not violate Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act, and we shall therefore dismiss this portion of the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent

[3] The parties stipulated that the cards were checked by neutral parties and on that basis Respondent Employer accorded recognition to Respondent Union. The Administrative Law Judge rejected Respondent Union's contention that recognition was accorded to it based on the fact that a majority of the employees had signed authorization cards. In this regard, the Administrative Law Judge notes that the General Counsel specifically refused to stipulate that the card check revealed that a majority of the employees had signed authorization cards.

[4] See *Bruckner*, 262 NLRB at 958, which holds that, once notified of a valid petition, an employer must refrain from recognizing any of the rival unions.

[5] We note that while there was testimony that a majority of Respondent Employer's employees signed cards authorizing the Charging Party and there was a stipulation that Respondent Employer recognized Respondent Union on the basis of a card check by a neutral party, neither the General Counsel nor the Charging Party introduced into evidence the signed authorization cards establishing the majority status of the Charging Party. Nor were any cards authorizing Respondent Union submitted. In such circumstances we are unwilling to analyze this case under the principles of *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), concerning the propriety of a bargaining order to remedy unfair labor practices or *Crest Containers Corporation*, 223 NLRB 739 (1976), concerning recognition in the context of dual authorization cards. We are especially unwilling to do so because no party raised these theories and the case was litigated solely on the basis of the *Midwest Piping* doctrine. Accordingly, we are constrained to apply only the standards set forth under *Bruckner*.

Member Jenkins concurs in the result, but does not rely on *Bruckner*.

Employer Great Southern Construction, Inc., Wellington, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs A, 1(d) and (e) and paragraphs A, 2(b) and (c) and reletter accordingly.
2. Delete section B of the recommended Order and Appendix B.
3. Substitute the attached notice for Appendix A of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations as to Respondent Union be dismissed in their entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in Operating Engineers Local Unions 101 and 627, Pipeliners Local Union 798, and Laborers Local Union 1290, or in any other labor organization of our employees, by laying off or discharging our employees or by otherwise discriminating in regard to hire or tenure of their employment or any term or condition of employment.

WE WILL NOT engage in the surveillance of our employees' union activities.

WE WILL NOT question our employees about their union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Claude Daniell, Jerry Young, John L. Yarbrough, John Glen Yarbrough, and James W. Yarbrough immediate and full reinstatement to their former positions or, if such positions do not exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make each of them whole for any loss of earnings they suffered as the result of our discrimination against them, plus interest.

GREAT SOUTHERN CONSTRUCTION, INC.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in the above-captioned cases held on December 15, 1981, is based upon unfair labor practice charges filed against Great Southern Construction, Inc., herein called Respondent Employer, and Off-Shore Drilling & Allied Workers, National Maritime Union of America, AFL-CIO, herein called Respondent Union, and collectively called Respondents. On April 3, 1981, the charges in Cases 17-CA-10274-1 and 17-CA-10274-2 were filed by Operating Engineers Local 101 & 627, International Union of Operating Engineers, AFL-CIO, herein called Operating Engineers Locals 101 and 627; Pipeliners Local Union 798, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, herein called Pipeliners Local 798; and Laborers International Union of North America, Local 1290, AFL-CIO, herein called Laborers 1290; collectively called the Unions. On April 3, 1981, the Unions filed the charges in Case 17-CB-2416. On April 20, 1981, Pipeliners Local 798 filed the charge in Case 17-CA-10306.

On May 13, 1981, the Regional Director of the National Labor Relations Board, Region 17, on behalf of the Board's General Counsel, issued complaints against Respondents in the aforesaid cases which on June 5, 1981, were consolidated by the Regional Director for a hearing before an administrative law judge. In Cases 17-CA-10274-2 and 17-CA-10306 the complaint alleges that Respondent Employer violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by interrogating employees about their union sentiments and activities and by engaging in the surveillance of employees' union activities. The complaint in these cases further alleges that Respondent Employer violated Section 8(a)(3) and (1) of the Act by discharging employees Claude C. Daniell, James W. Yarbrough, John L. Yarbrough, John Glenn Yarbrough, William Jerry Young, and Steve Treadwell because of their union activities and sentiments. In Cases 17-CA-10274-1 and 17-CB-2416 the complaint alleges that Respondent Employer violated Section 8(a)(1) and (2) and Respondent Union Section 8(b)(1)(A) and (2) of the Act when Respondent Employer granted recognition to Respondent Union as the exclusive collective-bargaining representative of a unit of Respondent Employer's employees and thereafter entered into a collective-bargaining contract which contained a union-security provision covering these employees despite the existence of a real question concerning the representation of the employees. Respondents filed answers denying the commission of the alleged unfair labor practices.[1]

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

[1] Respondents admit that each of the unions involved in this proceeding—Operating Engineers Locals 101 & 627, Pipeliners Local 798, Laborers Local 1290 and Respondent Union—are labor organizations within the meaning of Sec. 2(5) of the Act. Likewise Respondents admit that Respondent Employer meets one of the National Labor Relations Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence: A Chronology*

Respondent Employer is a construction contractor. Respondent Employer is constructing a pipeline from Medford, Oklahoma, to Conway, Kansas, herein sometimes called the project. The office for the project is located in Wellington, Kansas. Respondent Employer's general superintendent in charge of the project is Hurschel Carey. The pipe foreman is Nick Eddy who is also known as Dennis Farrar. The welding foreman is Gary Williams. Respondent Employer's president is B. F. Sadler. Carey, Eddy, and Sadler are admittedly supervisors within the meaning of Section 2(11) of the Act. Respondent Employer in its answer to the complaint denies that during the time material herein Williams was a statutory supervisor. There is insufficient evidence to establish that Williams, during the time material herein, was a statutory supervisor.

On or about February 12, 1981,[2] representatives of the Unions met and decided to organize Respondent Employer's construction employees employed on the project. Earlier in February, Harold Palmer, a representative for Operating Engineers Local 101, asked Respondent Employer's president, B. F. Sadler, whether there was a possibility for Respondent Employer and Operating Engineers Locals 101 and 627 to enter into a collective-bargaining agreement covering the project. Sadler responded in the negative. He explained to Palmer that he had bid the job "so cheap" that there was no way he could pay union wage rates.

From approximately February 12 to approximately February 21 representatives of the Unions solicited the employees employed by Respondent Employer on the project to sign cards authorizing the Unions to act jointly as their collective-bargaining representatives. During this period between February 17 and February 20, representatives of the Unions held organizational meetings in the trailer of employee Young, where employees Young and Daniell lived, and in the mobile home of employee John L. Yarbrough, herein called Yarbrough Sr., where Yarbrough Sr. lived with his two sons, John Glenn Yarbrough and James William Yarbrough, who were also employees of Respondent Employer. Young, Daniell, and the three Yarbroughs signed union authorization cards.

On February 18, at the end of the workday, Pipe Foreman Eddy informed several employees including Daniell and Young, who were welders, and Yarbrough Sr. who was Young's helper, that they would not work for the next 3 or 4 days because Respondent Employer was going to do its repair work and that while the employees were off from work they would be paid showup time.

On February 20, at or about mid-morning, Young, Daniell and Yarbrough Sr. spoke to President Sadler in the Company's parking lot about the fact that they were not working. Young asked why Daniell and himself were not working when other welders were working who were not as good as Young and Daniell. Sadler stated that he did not know. He explained to Young that he had just returned from Tulsa, Oklahoma, and stated he would check into the matter. Young then asked whether Sadler intended to sign a union contract. He told Sadler that he had heard Sadler intended to do so. Sadler stated he did not intend to sign a contract with the Union because there were too many wounds which had not healed and that he still had some "axes to grind," in particular with Pipeliners Local 798. Sadler also stated that the Unions were trying to organize his employees and asked whether Young and Daniell were members of Local 211, the Pipefitters Local Union located in Texas where Young and Daniell lived. Sadler informed Young and Daniell that the reason he was asking whether they were union members was that he had heard that some of the employees were union members. Young answered that they were not members of Local 211. Sadler asked whether Young and Daniell were afraid of the Union and told them he thought they were about the best welders in his employ and that he needed them and wanted them to remain in his employ. Young told Sadler that they were not afraid of the Union. Sadler ended the conversation by indicating that the reason for his above-described remarks was that he thought the Union would picket the project and that he wanted to know where Young and Daniell stood and wanted them to know where he stood.[3]

On February 20, immediately after the aforesaid conversation, Yarbrough Sr. phoned Union Representative Palmer and informed him that Sadler had indicated he did not intend to sign a contract with any union. That evening Palmer visited Young and Daniell at their trailer and told them that the Unions intended to show the employees' authorization cards to Sadler the next day, Saturday, February 21, rather than Monday. Yarbrough Sr. and his son, James William Yarbrough, visited Young after Palmer had already been there for approximately 10 minutes. As Yarbrough Sr. drove his automobile into Young's driveway, Yarbrough and his son observed that Respondent Employer's general superintendent, Hurschel Carey, whose trailer was located approximately 150 feet from Young's, was standing between 6 and 10 feet from the window of Young's trailer and appeared to be looking into the window. When Carey observed the automobile approaching, he walked away towards his own trailer. The Yarbroughs informed Young, Daniell, and Palmer that Carey had been standing outside of the trailer window.[4]

The next morning, February 21, at approximately 7 a.m., several representatives from the Unions visited the Respondent Employer's facility in Wellington, Kansas. Gerald Ellis, the business manager for Operating Engineers Local 627, acted as spokesperson. He asked Re-

[2] All dates herein, unless otherwise specified, refer to 1981.

[3] The description of the above-described conversation is based on a synthesis of the undenied testimony of employees Young, Daniell, and Yarbrough Sr.

[4] The description of Carey's conduct described above is based on a synthesis of the undenied testimony of Yarbrough Sr. and his son who impressed me as credible witnesses.

spondent Employer's general superintendent, Carey, if he could speak to him after he dispatched the employees to work. Thereafter, at approximately 7:30 a.m., Ellis advised Carey that the Unions had organized Respondent Employer's construction employees and that 51 of the employees had signed cards authorizing the Unions to represent them. Ellis gave these cards to Carey, who, after looking at about one-half of them, handed them back. Carey acknowledged that the Unions represented the employees because Respondent Employer employed between 60 and 65 employees and stated that he knew the Union's representatives had been on the job for several days organizing the employees. Ellis handed the cards to another business representative who read out loud the names of each one of the employees who had signed a card and asked Carey if they were on Respondent Employer's payroll. Carey stated that all but one were still on Respondent Employer's payroll. Ellis demanded that Respondent Employer begin bargaining with the Unions for a collective-bargaining agreement covering its employees. Carey replied that he did not have the authority to recognize the Unions and that the Unions' representatives would have to talk with Sadler, Respondent Employer's president, whose office was in Jenks, Oklahoma. Later that day, at approximately 3 p.m., Ellis phoned Sadler and informed him of his conversation with Carey and told him that the Union wanted to sit down and negotiate an agreement with Respondent Employer. Sadler answered that he had a deep-seated hatred for Pipeliners Local 798 and under no circumstances would he recognize Pipeliners Local 798. Ellis stated that the Unions had proved that they represented a majority of the employees. Sadler stated that he did not doubt what Ellis was saying but that he would not "work with" Pipeliners Local 798 and could not "go union" without the approval of his backer, the Getty Oil Company. Sadler, however, apparently agreed to meet with Ellis and the other representatives of the Unions on Wednesday, February 25, at Respondent Employer's facility in Wellington, Kansas.

On February 21, Ellis, after speaking with Sadler, sent a mailgram to Sadler which summarized what was stated at Ellis' earlier meetings with Superintendent Carey and Sadler. The mailgram ended as follows:

> IN ACCORDANCE WITH MY DEMAND FOR BARGAINING AND OUR TELEPHONE CONVERSATION TODAY THIS WILL CONFIRM OUR AGREEMENT TO MEET AT YOUR WAREHOUSE IN WELLINGTON, KANSAS ON WEDNESDAY, FEBRUARY 25, 1981 AT 7:30 A.M. WITH THE INTENDED PURPOSE OF NEGOTIATING AND CONSUMATING AGREEMENTS FOR YOUR EMPLOYEES ON THE ABOVE NOTED GETTY PROJECT BY THE [UNIONS]. THE EMPLOYEES SIGNING UNION AUTHORIZATION CARDS ARE AS FOLLOWS: [Mailgram names 51 employees including the alleged discriminatees James William Yarbrough, Claude C. Daniell, John Glenn Yarbrough, John Yarbrough and William Jerry Young.] WE THE [UNIONS] ARE LOOKING FORWARD TO CONSUMMATING AGREEMENTS WITH YOUR COMPANY FOR YOUR EMPLOYEES PER THEIR REQUEST, AND WE ARE LOOKING FOR AN AMICABLE LABOR RELATIONS CLIMATE WITH YOUR COMPANY. SATISFACTORY PRODUCTIVITY FOR YOUR COMPANY AND YOUR EMPLOYEES UNDER THE TERMS NEGOTIATED BARGAINING AGREEMENTS IS OUR INTENDED PURPOSE AND AIM.

On February 21, at approximately 7 a.m., Superintendent Carey informed welders Young, Daniell, and Luginbill and Young's helper, Yarbrough Sr., and Luginbill's helper that they were laid off because Respondent Employer was reducing the size of its crew. Shortly thereafter in the Company's office, Carey also told welder's helper John Glen Yarbrough, Yarbrough Sr.'s son, that he was laid off because there were too many defective welds on the pipeline which they were going to have to go back and repair before they could start up again. In the same breath, however, Carey, referring to Yarbrough Sr. who was standing outside the office, stated to John Glenn Yarbrough, "if you want to work here, you need to get rid of that red headed [expletive deleted]." John Glenn Yarbrough left the office and as he was walking toward the parking lot Pipe Foreman Eddy stated to him, "I thought you wanted to work." When Yarbrough indicated he, in fact, wanted to work, Eddy, referring to Yarbrough's father, Yarbrough Sr., stated "you are with that union organizing [expletive deleted], you must not want to work bad." John Glenn Yarbrough answered that he could not help it if Yarbrough Sr. was his father and assured Eddy he wanted to work. Eddy answered, "you don't have to worry about working on this job because there is not any union [expletive deleted] going to work on this job." Eddy then spoke to Yarbrough Sr. he called Yarbrough Sr. a "union organizing [expletive deleted]." Yarbrough Sr. replied he was not *per se* for the Union but would not cross a union picket line. Eddy told him "you don't have to worry about working on this job anyway, you sorry red headed [expletive deleted]."

On February 21, Yarbrough Sr.'s other son, James William Yarbrough, who was employed by Respondent as a laborer, went to the Company's yard at approximately 6:45 a.m. to see if there was work and was informed that he was scheduled to drive one of the Company's trucks that day. At approximately 7 a.m. Yarbrough went to the office and asked Pipe Foreman Eddy if, as he had been previously instructed, he would drive a truck that day. Eddy answered in the affirmative, but then told him to wait outside the office for a minute. Eddy spoke briefly to Superintendent Carey after which Eddy asked Yarbrough, "if [he] had any contact with the Union." Yarbrough answered in the affirmative. Eddy told him that personally Eddy thought he was a pretty good worker and if it were left up to Eddy he would have kept Yarbrough on the crew, but that Superintendent Carey felt that since Yarbrough's father and brother were engaged in instigating for the Union that it was best to lay off Yarbrough as well as his father and brother.

On February 25, representatives from the Unions including Mike Ellis, the business manager of Operating Engineers Local 627, met as scheduled with Respondent Employer's president, B. F. Sadler, and Superintendent Hurschel Carey. Ellis, who was the Unions' spokesper-

son, informed Sadler and Carey that the Unions had gotten authorization cards from 51 of Respondent Employer's employees and jointly represented a majority of the employees and asked that Respondent Employer enter into contract negotiations with the Unions covering the employees. Sadler replied that because of his past differences with Pipeliners Local 798 and Respondent Employer's poor financial condition that he did not intend to recognize the Unions. At this point all of the Unions' representatives except for the representatives from Pipeliners Local 798 left the room in an effort to see whether Local 798 and Sadler could resolve their differences. This proved unsuccessful, so Ellis returned and informed Sadler that if Respondent Employer did not recognize the Unions that the Unions would have to take economic action and that the Unions intended to file unfair labor practice charges against Respondent Employer. Sadler told Ellis that the Unions should do what they wanted to do but that Sadler did not intend to sign an agreement with "anybody" and did not intend to recognize "any union." Hearing this, the Unions' representatives left the room and established picket lines at Respondent Employer's warehouse and at the jobsite. The picket signs stated that Respondent Employer was refusing to bargain with the Unions.[5]

On February 25, after his above-described meeting with the Unions' representatives, Sadler sent a mailgram to Ellis which reads as follows:

> DEAR MR. ELLIS PLEASE BE ADVISED THAT [RESPONDENT EMPLOYER] DOUBTS THAT AN UNCOERCED MAJORITY OF OUR EMPLOYEES HAVE SELECTED [THE UNIONS] TO REPRESENT THEM FOR PURPOSES OF COLLECTIVE BARGAINING. ACCORDINGLY WE ARE DECLINING TO RECOGNIZE THESE UNIONS AS REPRESENTATIVES OF OUR EMPLOYEES. BE FURTHER ADVISED THAT AT NO TIME DID H.W. CAREY OR ANY OTHER OFFICIAL OF [RESPONDENT EMPLOYER] EVER EXAMINE THE AUTHORIZATION CARDS THAT YOUR ORGANIZATION CLAIMS TO POSSESS AND FURTHER H.W. CAREY AND NO OTHER AUTHORIZED OFFICIAL OF THIS COMPANY HAS EVER ACKNOWLEDGED THAT YOUR ORGANIZATIONS REPRESENTS A MAJORITY OF OUR NONSUPERVISORY EMPLOYEES AS OF 2-21-81 OR ANY OTHER DATE. BE FURTHER ADVISED THAT IF YOU SEEK TO ESTABLISH THAT YOU REPRESENT A MAJORITY OF OUR EMPLOYEES, YOU SHOULD PETITION THE NLRB SO THAT A SECRET BALLOT ELECTION CAN BE CONDUCTED.

On February 25, after the above-described meeting between Sadler and Carey with the Unions' representatives, Carey sent identical mailgrams to the three Yarbroughs, Young, and Daniell, which read as follows:

> YOU ARE ADVISED THAT WE NOW HAVE AN IMMEDIATE OPENING OF EMPLOYMENT FOR YOU. IF YOU ARE INTERESTED IN REEMPLOYMENT WITH [RESPONDENT EMPLOYER] PLEASE CONTACT THIS OFFICE AT [PHONE NUMBER]. IF WE HAVE NOT HEARD FROM YOU BY 7 A.M. ON MONDAY, MARCH 2, 1981 WE WILL ASSUME THAT YOU ARE NOT INTERESTED IN REEMPLOYMENT.

On March 2 at approximately 6:30 a.m., in response to Carey's mailgram, employees Young, Daniell, and the three Yarbroughs reported for work. They were met outside Respondent Employer's office by Carey who asked them what they wanted. Young told him that they were there in response to Carey's February 25 mailgram stating that there were immediate job openings for them. Carey asked them to wait and went back into the office. He returned shortly accompanied by Pipe Foreman Eddy.

Carey informed Young, who was a welder, that Young and Young's helper, Yarbrough Sr. could go to work.

Carey informed Daniell, who was a welder, there was no job for him inasmuch as the inspectors had barred him from the job because of his poor welding. Carey stated he did not learn of this until after sending the February 25 mailgram.

Carey informed James William Yarbrough, who was a laborer, that there was no work for him because they were repairing the defective welds that day for which work Carey was using a skeleton crew and that he preferred using the laborers with more experience than Yarbrough for this type of work. Carey instructed Yarbrough to check with him the next day about work.

Carey informed John Glenn Yarbrough, who was a welder's helper, that Carey had to use another welder's helper because the other helper had more seniority. Carey assured Yarbrough that another welder would be there the next morning and that Yarbrough would go to work then.

When Carey stated that Young and Yarbrough Sr. would be going to work, Pipe Foreman Eddy asked them, "how in hell can you [expletive deleted] walk across the picket line when you are union," and stated that since they carried union books and could not cross the picket line that Carey was crazy to hire them. Carey told Eddy to shut his mouth because, he assured Eddy, Young and Yarbrough, Sr., would not last on the job until noontime. Eddy followed Young and Yarbrough Sr. when they went to the supply center to draw their supplies. Eddy asked Young why he had returned to work. Young told him that Carey had sent him a mailgram stating there was a job available and he needed the work. Eddy asked whether Young carried a union book in his pocket. When Young answered "yes," Eddy asked him how, with a union book, Young was going to cross the picket line and what the Unions would say about his crossing the picket line. Young told Eddy that, if Eddy were interested, he should ask the Unions' representative.

On March 2, shortly after Young and Yarbrough Sr. started work, Respondent Employer's president, B. F. Sadler, drove up to their worksite and called them over to his automobile. Sadler threatened to file conspiracy charges against them and asked if Young knew what he was talking about. Young answered "no." Sadler stated that the Unions had sent Young to work in order to sab-

[5] A majority of the employees who were working for Respondent Employer on the project on February 25 ceased work when the picketing commenced.

otage Sadler's pipe. Young denied this. Sadler asked whether Young had talked to any representative of Pipeliners Local 798. Young answered "no." Sadler warned Young that he could continue working but that Sadler would file a conspiracy charge if there were any bad welds or if Young and Yarbrough Sr. were slow in moving from one work station to the next station or engaged in any other conduct which hindered the progress of the pipeline. Sadler asked whether Young had a Local 798 book in his pocket. Young admitted this was true. Sadler asked why Young was crossing the picket line. Young replied that the representatives of the Unions said he could cross the line to work. Young told Sadler that he should speak to the Unions' officials if he wanted to know any more. Sadler asked Yarbrough Sr. if he had signed an authorization card for the Unions. Yarbrough Sr. answered in the affirmative. Sadler repeated that he could bring both Yarbrough Sr. and Young up on conspiracy charges and did not want any bad welds or "slow wobbling," a reference to moving from one work station to the next work station slowly. Sadler ended this conversation by stating, "you give me a day's work for a day's pay and we will get along."

On March 2, approximately every 15 minutes or so for the remainder of the morning, Sadler drove slowly by where Young and Yarbrough Sr. were working and would visually observe their work. This was in sharp contrast to Sadler's past practice of rarely inspecting employees' work. In addition the X-ray rigs used to inspect the welds had been moved unusally close to where Young and Yarbrough were working.

On the morning of March 2, approximately 2 hours after his first conversation with Young and Yarbrough Sr., Sadler once again stopped his automobile at their worksite and spoke to them a second time. He repeated his warning that he intended to file conspiracy charges against them if their work was unsatisfactory. He also told Young that he thought Local 798 was using him as a puppet and that Young was too good a welder to be used as a puppet. Sadler told Young that if Young would throw away his book with Local 798 that Sadler would reimburse him for the money he had spent in getting the union book and would guarantee his employment with Respondent Employer. Young declined this offer. Sadler ended the conversation by informing Young that so long as Young did not damage the pipe there would not be any trouble but threatened Young with conspiracy charges if he made any bad welds or otherwise performed any unsatisfactory work.

During the lunch period on March 2, Pipe Foreman Eddy asked Young why he still remained on the job when he was not wanted. Young stated that he was not bothering anyone and needed the job. Eddy indicated that he wished Young would leave the job.

On March 2, shortly after the lunchbreak, Sadler returned to where Young and Yarbrough Sr. were working and got out of his automobile and, after inspecting Young's welds, informed Young that so far everything looked good and told him to keep it that way. Sadler once again stated that he thought Local 798 was using Young as a puppet. Shortly after this, Sadler again returned to where Young and Yarbrough Sr. were working and got out of his automobile and once again inspected Young's welds, at which point Young told Sadler, "I think the best thing for both of us is for me to get my money and just go on." Sadler answered, "that is the best thing you've done all day," and told Young that it would be better for everyone if Young left but that if Young gave up his union book he could continue to work for Respondent Employer. Sadler also remarked to Yarbrough Sr. "I guess you'll be going too." Yarbrough Sr. answered, "I suppose so." Sadler stated he would instruct the bookkeeper to make out their paychecks and asked them if they would work for the approximately 2 hours left that day. They agreed. In fact, Young and Yarbrough Sr. worked for the rest of the afternoon and not once thereafter did Sadler inspect Young's work or drive by the area where they were working.

James William Yarbrough and John Glenn Yarbrough, on March 2, as described *supra* were informed by Superintendent Carey there were no jobs available for them on that day. For the remainder of that week, March 3 through 6, they repeatedly asked Carey for work without success. Carey, in rejecting James William Yarbrough's daily request for work, either told him that only a skeleton crew was being used to do repair work and that Carey needed laborers for this work with more experience than Yarbrough or that due to the rain and mud not many employees were working. In rejecting John Glenn Yarbrough's daily request for work Carey either told him that there were no welders for him to work with or that due to the rain and mud they were only doing repair work.

On or about March 3 Respondent Employer recognized Respondent Union as the exclusive collective-bargaining representative of all of its construction employees on the project pursuant to a check of authorization cards by neutral parties.[6] On March 7 Respondents entered into a collective-bargaining agreement covering all of Respondent Employer's construction employees effective from March 7 until September 6 which, among other provisions, includes a 7-day union-security agreement and a provision providing for the checkoff of initiation fees and dues. The contractual union-security provision reads as follows:

> It shall be a condition of employment that all employees of the Contractor covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing and those who are not shall on or after the seventh (7th) day fol-

[6] This finding is based on a stipulation entered into by all of the parties to this proceeding. I reject Respondent Union's contention that Respondent Employer recognized Respondent Union based on a card check which revealed that Respondent Union had secured authorization cards from a majority of Respondent Employer's employees and that all but two of the cards were dated either March 2 or March 3. The record shows that counsel for the General Counsel specifically refused to stipulate that the card check revealed that Respondent Union had secured cards from a majority of the employees and that nonetheless Respondents accepted the stipulation as proposed by the General Counsel. Also, even though Respondent Employer refused to stipulate that all but two of the cards were dated either March 2 or March 3, Respondent Union accepted the stipulation.

lowing the effective date of this agreement or the execution date, whichever comes later, become and remain members in good standing of the Union. It shall be a condition of employment that all employees of the contractor covered by this agreement and hired on or after its effective date or execution date, whichever comes later, shall on or after the seventh (7th) day following the beginning of such employment become and remain members in good standing of the Union.

B. *Conclusionary Findings and Discussion*

1. Cases 17-CA-10274-1 and 17-CB-2416

The consolidated complaint issued in the above-captioned cases alleges that Respondent Employer violated Section 8(a)(1) and (2) of the Act by granting recognition and entering into a collective-bargaining agreement with Respondent Union covering Respondent Employer's construction employees, which agreement contained a union-security provision, notwithstanding the existence of a real question concerning representation when it engaged in the aforesaid conduct. The consolidated complaint further alleges that Respondent Union violated Section 8(b)(1)(A) of the Act by obtaining recognition from Respondent Employer as the exclusive representative of Respondent Employer's construction employees and by entering into a collective-bargaining agreement with Respondent Employer covering these employees, notwithstanding the existence of a real question concerning representation when it engaged in the aforesaid conduct. The complaint also alleges that Respondent Union violated Section 8(b)(2) by entering into the aforesaid agreement, notwithstanding the existence of a real question concerning representation, because said agreement contained a union-security proviso.

The theory of the complaint in these cases is based on the Board's doctrine established in *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945). Under the *Midwest Piping* doctrine, "an employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of these unions until the right to be recognized has finally been determined under the special procedures provided by the Act."[7] *Retail Clerks Union, Local 770* v. *N.L.R.B.*, 370 F.2d 205, 207 (9th Cir. 1966). If an employer ignores this doctrine and improperly recognizes one of the unions involved, it violates Section 8(a)(2) and (1) of the Act. Likewise, a union's acceptance of recognition, or its execution of a contract where a real question concerning representation exists, is similarly destructive of employees' rights and therefore violates Section 8(b)(1)(A) of the Act. For, by accepting recognition by the employer as the exclusive bargaining representative of all the employees in the unit, the union precludes the employees from expressing their free choice in selecting either that or any other union as their bargaining representative. *International Ladies Garment Workers' Union* v. *N.L.R.B.*, 366 U.S. 731, 738 (1961); *N.L.R.B.* v. *Downtown Bakery Corp.*, 330 F.2d 921, 928 (6th Cir. 1964); *N.L.R.B.* v. *Raymond Buick, Inc.*, 445 F.2d 644 (2d Cir. 1971). And where the improperly recognized union successfully negotiates a contract containing a union-security clause, requiring the employees to join the union as a condition of their employment, the employer and union have conspired to unlawfully discriminate against employees with regard to their terms and conditions of employment in violation of Section 8(a)(3) and Section (b)(2) of the Act. *Local Lodge 1424, International Association of Machinists, AFL-CIO* v. *N.L.R.B.*, 362 U.S. 411, 412-414 (1960); *N.L.R.B.* v. *Food Employers Council, Inc.*, 399 F.2d 501, 502 (9th Cir. 1968).

In the instant case it is undisputed that within 1 week after the Unions requested Respondent Employer to recognize them as the joint representatives of Respondent Employer's construction workers and negotiate a contract covering these employees that Respondent Employer granted recognition to Respondent Union as the exclusive bargaining representative of the employees and that 4 days later it executed a contract with Respondent Union which contained union-security and checkoff provisions. Thus, the crucial issue for decision herein is whether a real question concerning representation existed when Respondent Employer recognized Respondent Union as the exclusive bargaining representative of the employees. The sole requirement necessary to raise a real question concerning representation within the meaning of the *Midwest Piping* doctrine is that the claim of the rival union must not be "clearly unsupportable or specious, or otherwise not a colorable claim." *American Can Company*, 218 NLRB 102, 103 (1975); *The Boy's Markets, Inc.*, 156 NLRB 105, 107 (1965); *Playskool, Inc.*, 195 NLRB 560 (1972), enforcement denied 477 F.2d 66 (7th Cir. 1973).

I am of the opinion that the Unions' activities raised a substantial claim to represent Respondent Employer's construction employees employed on the project and am also of the opinion that when Respondent Employer granted recognition to the Respondent Union and entered into a collective-bargaining agreement with that Union, Respondent Employer knew that a real question concerning representation existed. Thus, from approximately February 12 to approximately February 21 the Unions conducted an organizational campaign among Respondent Employer's construction workers employed on the project and solicited the employees to sign cards

[7] Where, as in the instant case, no election petition has been filed, the Board's representation processes have not been invoked and the Board has no jurisdiction to order an election to resolve such a question. In this circumstance, the Employer may choose to recognize one of the competing unions; however, he does so at the peril of having violated the Act if the Board, in a subsequent unfair labor practice proceeding, determines that a question of representation existed at the time of recognition. *William Penn Broadcasting Co.*, 93 NLRB 1104, 1105, fn. 5 (1951); *National Carbon Division*, 100 NLRB 689, 698-699 (1952); cf. *International Ladies Garment Workers' Union* v. *N.L.R.B.*, 366 U.S. 731, 740 (1961). For this reason, it has been suggested that, where neither contending union has filed a petition, the employer's most prudent course is to itself file a petition with the Board. See *N.L.R.B.* v. *Hunter Outdoor Products, Inc.*, 440 F.2d 876, 880 (1st Cir. 1971); *N.L.R.B.* v. *Downtown Bakery Corp.*, 330 F.2d 921, 928 (6th Cir. 1964); *N.L.R.B.* v. *Signal Oil & Gas Co.*, 303 F.2d 785, 788, fn. 3 (5th Cir. 1962).

authorizing the Unions to jointly represent them for purposes of collective bargaining. On February 21, the Unions demanded that Respondent Employer recognize and bargain with the Unions as joint representatives of the Employer's construction workers employed on the project. In support of their demand the Unions submitted to the Respondent Employer for its inspection 51 cards signed by the employees authorizing the Unions to represent them.[8] On February 21, Respondent's president, B. F. Sadler, informed the Unions that he did not doubt their claim that they represented a majority of his employees, but stated that he rejected their demand for recognition and bargaining because of his animosity toward one of the Unions, Pipeliners Local 798, and because he could not "go union" without the approval of the contractor for whom he was installing the pipeline. On February 25 representatives of the Unions personally met with Sadler and renewed their demands for recognition and bargaining. Once again Sadler refused to recognize and bargain with the Unions. He based his refusal on his hatred of Pipeliners Local 798, the poor financial condition of the Company, and, on February 25 shortly after this meeting, Sadler, by mailgram, questioned the Unions' majority status and suggested that the Unions establish their representative status by filing a petition for an election with the National Labor Relations Board. On February 25, following Sadler's refusal to bargain with them, the Unions commenced to picket the project with signs stating that Respondent Employer was refusing to bargain with them. All of the foregoing factors clearly placed Respondent Employer on notice that the Unions maintained, if not a majority status, at least a continuing and substantial interest in representing its employees and that the Union's request for recognition and bargaining raised a real question of representation concerning the Company's construction workers employed on the project. In these circumstances, Respondent Employer breached its duty of neutrality and violated Section 8(a)(2) and (1) of the Act when less than 1 week after refusing to recognize and bargain with the Unions it abruptly recognized Respondent Union as its construction employees' bargaining representative and signed a contract with that union covering these employees. Likewise, in view of the existence of a real question concerning representation, Respondent Union violated Section 8(b)(1)(A) by demanding and accepting recognition from Respondent Employer and by entering into the contract with Respondent Employer. I also find that Respondent Employer violated Section 8(a)(3) of the Act and that Respondent Union violated Section 8(b)(2) of the Act by entering into a contract which contained a dues-checkoff provision and a union-security provision which required employees, as a condition of their continued employment, to establish or apply for membership in Respondent Union.[9]

I have considered and rejected Respondent Union's contentions that the record fails to establish that the Unions' organizational activity was sufficient to support a finding of a real question concerning representation; that the *Midwest Piping* doctrine is inapplicable because Respondents entered into a collective-bargaining relationship based on a showing that Respondent Union had been designated as the collective-bargaining representative by a majority of the employees; that Section 8(f) of the Act exempts contractors and unions in the construction industry from the applicability of the *Midwest Piping* doctrine; and that there is no basis for finding an 8(b)(2) violation because there is no evidence that the contractual union-security agreement was ever enforced.

The record, as described in detail *supra*, establishes that from approximately February 12 to approximately February 21 the Unions solicited Respondent Employer's construction employees employed on the project to support the Unions and to sign cards authorizing the Unions to represent them jointly as their collective-bargaining representative and that on February 21 the Unions, in support for their demand for recognition and bargaining, showed Respondent Employer cards purportedly signed by 50 of the Company's approximately 60 to 65 construction workers, and that in response to Respondent Employer's refusal to recognize and bargain with them, the Unions established picket lines at the project protesting Respondent Employer's refusal to bargain, and that a majority of the workers honor the picket line. These circumstances overwhelmingly establish the existence of a real question concerning representation during all times material herein.

I recognize that several courts have held that, even in the presence of rival organizing campaigns, *Midwest Piping* does not preclude an employer from granting recognition to one of the competing unions where the employer's action is based on a clear demonstration of majority support for that union. See, e.g., *N.L.R.B.* v. *Inter-Island Resorts, Ltd.*, 507 F.2d 411, 412 (9th Cir. 1974), and cases cited therein. This is not such a case. As I have found *supra*, the record does not establish that Respondent Employer recognized Respondent Union based on a showing that a majority of the employees had designated that union as their bargaining representative.

[8] As described in detail *supra*, Respondent Employer's project superintendent, Carey, in his conversation with the representatives of the Unions, indicated that all but one of the 51 employees whose signatures appeared on the cards were still employed by Respondent on February 21 and acknowledged that the Unions had secured cards from a majority of the employees inasmuch as Respondent Employer employed between 60 and 65 employees.

[9] The complaint does not specifically allege that this conduct violated Sec. 8(a)(3), alleging only a violation of Sec. 8(a)(2) and (1) and Sec. 8(b)(2). However, the Board has held that, so long as the complaint clearly describes the conduct alleged to constitute an unfair labor practice, the General Counsel's failure to allege which subsection of the Act has been violated or the General Counsel's allegation of a violation of the wrong subsection, does not preclude the Board from considering and deciding the issue, provided, of course, that the charged party was not misled and the issue was fully litigated. *Unit Train Coal Sales, Inc.*, 234 NLRB 1265, 1272 (1978). The complaint herein specifically alleges as unlawful the conduct found herein to be violative of Sec. 8(a)(3), and merely fails to allege a violation of this particular subsection of the Act. Under the circumstances Respondent Employer was not misled and was accorded a fair opportunity to fully litigate the issue. See *Unit Train Coal Sales, Inc.*, 234 NLRB at 1272. Moreover, the identical matter was specifically alleged as a violation of Sec. 8(b)(2) and Respondent Union fully litigated the issue.

The 8(f) proviso validating prehire exclusive recognition agreements in the construction industry by its expressed terms does not apply to prehire agreements violative of Section 8(a) of the Act.[10] Accordingly, the Board has held that Section 8(f) does not exempt contractors and unions in the construction industry from the requirements of the *Midwest Piping* doctrine. See *Couch Electric Company*, 143 NLRB 662, 669 (1963); *Komatz Construction, Inc.*, 191 NLRB 846, 851 (1971); see also *Associated General Contractors of California, et al*, 220 NLRB 540, 548, fn. 9 (1975), enforcement denied on other grounds 564 F.2d 271 (9th Cir. 1977).[11]

Lastly, the fact that the record is silent as to whether or not Respondents enforced the provisions of the contractual union-security and checkoff agreements is no defense to a finding that Respondent Union violated 8(b)(2) and Respondent Employer violated Section 8(a)(3) by entering into these agreements. For, as the court stated in *N.L.R.B.* v. *Forest City/Dillon-Tecon Pacific*, 522 F.2d 1107, 1109-10 (9th Cir. 1975):

> Since the purpose of the union security and checkoff agreements was to compel new employees to join the union and to pay fees and dues, and since the union had every incentive to enforce these provisions, we can only presume that the agreements were carried out and that the new employees were coerced to join the union. . . .
>
> Indeed, the union security clause and the dues checkoff provision are fundamental to the continued healthy existence of the union because they assure membership and money. Once in the contract it is difficult to imagine any set of circumstances where the provisions would not be enforced. Enforcement constitutes coercion; the presence of the provisions in the contract implies enforcement.

2. Case 17-CA-10274-2

(a) *On February 21 Respondent Employer lays off employees Young and Daniell and the three Yarbroughs*

The considerations set forth below persuade me the General Counsel has made a *prima facie* showing that the union activities of employees Young and Daniell and the three Yarbroughs were a motivating factor in Respondent Employer's decision on February 21 to lay them off.

Respondent Employer was opposed to its employees being represented by the Unions and was particularly hostile toward Pipeliners Local 798.

On February 18 and 19, representatives of the Unions held organizational meetings at the trailer where Young and Daniell lived and at the mobile home where the Yarbroughs lived. Young and Daniell and the three Yarbroughs signed cards designating the Unions as their collective-bargaining representatives. Young and Daniell joined Pipeliners Local 798.

By at least February 20 Respondent Employer had learned the Unions were engaged in a campaign to organize its employees. On that date Respondent Employer's president, B. F. Sadler, questioned Daniell and Young about their union membership and indicated to them that he had learned that some of the employees were union members.

On February 20, in the evening, Respondent Employer's project superintendent, Carey, engaged in the surveillance of a meeting between Young and Daniell with Union Representative Palmer which took place in Young's trailer. Carey left only when Yarbrough Sr.'s automobile approached Young's trailer. It was the next morning when they reported for work that Daniell and Young were abruptly laid off.

On February 21, contemporaneous with the layoff of the three Yarbroughs, Pipe Foreman Eddy apologized to James Yarbrough for having to lay him off, but explained to him that Superintendent Carey felt that since James Yarbrough's father and brother were union instigators that it was best to lay James Yarbrough off in addition to his father and brother. Also, on February 21, Eddy stated that John Yarbrough did not want to work on the project because he was with his father, Yarbrough Sr. who was a union organizer. Eddy told John Yarbrough, "You don't have to worry about working on his job because there is not any union [expletive deleted] going to work on this job." Eddy, at the same time, using obscene language, spoke to Yarbrough Sr. and called him a union organizer and told him he did not have to worry about working on the job.

The aforesaid undisputed evidence presented by the General Counsel effectively shifted the burden to Respondent Employer to show that it would have laid off Young and Daniell and the three Yarbroughs on February 21 even in the absence of their union activity.[12] Respondent Employer presented no evidence to explain why the five employees were laid off. Neither President Sadler, Superintendent Carey, nor Pipe Foreman Eddy testified. Nor does the testimony of the General Counsel's witnesses establish that the February 21 layoff of Daniell, Young and the three Yarbroughs was motivated by legitimate business reasons. In view of these circumstances I conclude that Respondent Employer has failed to meet its burden of showing that either Daniell or Young or any one of the three Yarbroughs would have been laid off in the absence of their union activities.

[10] In pertinent part, Sec. 8(f) of the Act reads as follows:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in Section 8(a)(4) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement . . . .

[11] In my opinion the cases cited by Respondent Union, *IBEC Housing Corp.*, 245 NLRB 1282 (1979), and *Corrugated Structures, Inc.*, 252 NLRB 523 (1980), are inapposite.

[12] The timing of the layoff of Daniell and Young coming hard on the heels of Superintendent Carey's surveillance of their meeting with Union Representative Palmer and the remarks made by Pipe Foreman Eddy on the day of the layoff, when viewed in the context of the union activities of the five alleged discriminatees on behalf of the Unions and Respondent Employer's opposition to the Unions, establish the General Counsel's *prima facie* case.

(b) *On March 2 Respondent Employer discharges employee Daniell*

On February 25, Superintendent Carey sent a mailgram to employee Daniell stating in pertinent part that "we now have an immediate opening of employment for you" and informed Daniell that if Carey did not hear from him by 7 a.m. on March 2 that he would assume Daniell was not interested in reemployment. When Daniell reported for work on March 2, Carey refused to employ him. Carey told Daniell that the reason for the refusal was that the inspectors had barred Daniell from the job because of his poor welding.

I am of the opinion that Respondent Employer's March 2 refusal to employ Daniell despite the fact that on February 25 it informed him there was a job available, when viewed in the context of Respondent Employer's February 21 layoff of Daniell because of his union activities, warrants a finding that the General Counsel has made a *prima facie* showing that Daniell's union activities were a motivating factor in Respondent Employer's decision on March 2 to refuse to reemploy him. Respondent Employer offered no evidence to support the assertion Carey made to Daniell that the inspectors had barred him from the job due to his poor welding and the record otherwise does not support Carey's assertion. In view of the foregoing, I find the General Counsel has established by a preponderance of the evidence that Respondent Employer discharged Claude Daniell on March 2 because of his union activities and his prounion sentiments. I therefore find that by engaging in this conduct Respondent Employer violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

(c) *On March 2 Respondent Employer discharges James William Yarbrough and John Glenn Yarbrough*

On February 25, Superintendent Carey sent identical mailgrams to James William Yarbrough and John Glenn Yarbrough stating in pertinent part that "we now have an immediate opening of employment for you" but that if Carey did not hear from them by 7 a.m. on March 2 he would assume they were not interested in reemployment. When they reported for work on March 2 Carey informed James William Yarbrough and John Glenn Yarbrough that there was no work for them that day. He told James William Yarbrough there was no work for him because Respondent Employer was only employing a skeleton crew to cut out defective welds and that Carey preferred to use employees with more experience than Yarbrough to do this work. He told John Glenn Yarbrough there was no work for him because he had to use another welder's helper as this welder's helper had more seniority than Yarbrough.

During the remainder of the week, March 3 through 6, the Yarbroughs asked Carey on a daily basis for work, but without success. In rejecting James William Yarbrough's daily request for work Carey either told him that a skeleton crew was doing repair work for which Carey needed more experienced employees than Yarbrough or that due to the rain and mud not many employees were working. In rejecting John Glenn Yarbrough's daily request for work Carey either told him there was no welder available for him to work with or that due to the rain and mud they were only doing repair work. Since without work the Yarbrough brothers were unable to afford the expenses associated with living away from home, on March 6 they returned home.[13]

I am of the opinion that Respondent Employer's refusals from March 2 through March 6 to employ James and John Yarbrough despite the fact that Respondent Employer on February 25 had informed them there were jobs available for them, when viewed in the context of their earlier layoff by Respondent Employer on account of their union activities, warrants a finding that the General Counsel has made a *prima facie* showing that the union activities and prounion sentiments of James Yarbrough and John Yarbrough were a motivating factor in Respondent Employer's decision on March 2 to refuse to reemploy them. Respondent Employer offered no evidence to explain why the Yarbrough brothers were refused reemployment from March 2 through 6, despite the fact that on February 25 Respondent Employer invited them to return to work because there were jobs available for them. Neither President Sadler, Superintendent Carey, or Pipe Foreman Eddy testified. Nor does the record otherwise establish that Respondent Employer's refusal to employ the Yarbrough brothers from March 2 through 6 was motivated by legitimate business considerations.

Based upon the foregoing, I find that a preponderance of the evidence establishes that Respondent Employer on March 2 discharged James William Yarbrough and John Glenn Yarbrough because of their union activities and prounion sentiments. I further find that by engaging in this conduct Respondent Employer violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.

(d) *On March 2 Respondent Employer discharges Young and Yarbrough Sr.*

On February 9 Young and Yarbrough Sr. were hired by Respondent Employer. Young was employed as a welder and Yarbrough Sr. as a welder's helper. During their entire employment with Respondent Employer they worked as a team. On February 21 they were laid off due to their union activities and on March 2 were reemployed but the same day quit their employment. The General Counsel contends that they were constructively discharged. Conceptually constructive discharge occurs when an employee quits "[because] an employer deliberately makes [his or her] working conditions intolerable." *J. P. Stevens & Co., Inc.* v. *N.L.R.B.*, 461 F.2d 490, 494 (4th Cir. 1972). It becomes unlawful when this is done because of an employee's union activity. *Id.* Accordingly, when it is shown that an employer imposed onerous working conditions on an employee it knew had engaged in union activity, which it reasonably should have seen would induce that employee to quit, a *prima facie* case of constructive discharge is established, requiring the employer to produce evidence of legitimate motivation. I am persuaded that on March 2 Respondent Employer created an intolerable employment situation for Young

[13] The Yarbroughs resided approximately 350 miles from the project.

and Yarbrough Sr. and did so with intent of forcing them to quit their employment because of their union activities. In so concluding, I have relied upon the factors set forth immediately below.

On March 2, when Superintendent Carey assigned jobs to Young and Yarbrough Sr., Pipe Foreman Eddy strenuously objected on account of their union membership. In response, Carey assured Eddy, in the presence of Young and Yarbrough Sr., that Young and Yarbrough Sr. would not last on the job past noontime. Thereafter, Respondent Employer, during the approximately 6 hours Young and Yarbrough Sr. worked before quitting that day, engaged in a course of conduct calculated to make Young and Yarbrough Sr. feel that Respondent Employer was keeping their work under close surveillance for the purpose of finding a reason to justify their discharges. Thus, before lunchtime President Sadler on several occasions warned Young and Yarbrough Sr. that he would file conspiracy charges against them if their work performance was not satisfactory. In the same breath, Sadler offered to guarantee Young's employment if he withdrew from the Union. And, as part and parcel of his threat to file conspiracy charges against Young and Yarbrough Sr. if their work was not satisfactory, Sadler drove by their workplace approximately every 15 minutes or so to inspect their work and placed the X-ray equipment used to inspect their work unusually close to where they worked. During the lunch period, Pipe Foreman Eddy told Young that Young was not wanted on the job and asked him to leave. When work resumed after lunch Sadler resumed his surveillance of Young's and Yarbrough Sr.'s work and when Sadler was in the process of inspecting their work for the second time in quick succession Young declared, "I think the best thing for both of us is for me to get my money and just go." Sadler's reply was that Young's decision to quit was the best thing Young had done all day, that it would be better for everyone if Young quit, but stated that if Young withdrew from the Union he could remain in Respondent Employer's employ. Sadler's response clearly indicates that Sadler did not regard Young's decision to quit to be a voluntary one, but a decision which Sadler's actions had forced Young to make because of Young's union membership.

Based on the foregoing, and the fact that Respondent Employer laid off Young and Yarbrough Sr. on February 21 because of their union activities, I find that the General Counsel has established a *prima facie* case that Young and Yarbrough Sr. were discharged on March 2 because of their union activities.[14] Since Respondent Employer presented no evidence that the March 2 discharge of Young and Yarbrough Sr. was motivated by legitimate economic considerations, I further find that by discharging Young and Yarbrough Sr. on March 2 because of their union activities and prounion sentiments Respondent Employer violated Section 8(a)(3) and (1) of the Act.

(e) *Respondent Employer engages in surveillance of employees' union activities and sentiments*

The complaint alleges that on February 20 Respondent Employer, through Superintendent Carey, engaged in the surveillance of employees' union activities in violation of Section 8(a)(1) of the Act. In support of this allegation the General Counsel presented undisputed evidence that on the evening of February 20 Superintendent Carey was observed by employees Yarbrough Sr. and James Yarbrough standing between 6 and 10 feet from the window of employee Young's trailer looking into the trailer. Employees Young and Daniell at the time were meeting with Union Representative Palmer inside the trailer. Although Carey lived in a trailer located in the same trailer court as Young's, Carey was not called to explain why, on February 20, he was looking into the window of Young's trailer. Under these circumstances I find that by virtue of Carey's conduct Respondent Employer violated Section 8(a)(1) of the Act by engaging in the surveillance of employees' union activities.

The complaint alleges that on February 21 Respondent Employer, through Pipe Foreman Eddy, interrogated employees about their union sentiments and activities in violation of Section 8(a)(1) of the Act. In support of this allegation the General Counsel presented undisputed evidence that on February 21 Pipe Foreman Eddy asked employee James Yarbrough "if he had any contact with the Union," and that when Yarbrough answered in the affirmative Eddy told Yarbrough he was being laid off because Superintendent Carey felt that Yarbrough's father and brother were union instigators and that it would be best to lay off Yarbrough along with his father and brother. Under these circumstances I find that by virtue of Eddy's above-described conduct Respondent Employer violated Section 8(a)(1) of the Act by interrogating employee James Yarbrough about his union sentiments and activities.

The complaint alleges that between February 19 and February 21 and on March 2 and 3 Respondent Employer, through President Sadler, interrogated employees about their union membership and activities in violation of Section 8(a)(1) of the Act. In support of this allegation counsel for the General Counsel presented undisputed evidence that on February 20 and March 2 Sadler questioned employees about their union sentiments and activities. On February 20, Sadler asked employees Young and

[14] I recognize that the greatest part of Respondent Employer's harassment on March 2 was directed towards Young, rather than Yarbrough Sr. Nonetheless, I am persuaded that the record, as described in detail above, establishes that Respondent Employer constructively discharged Yarbrough Sr. because of his union activities. In any event, since the record also establishes that the direct proximate cause of Yarbrough Sr.'s termination was Respondent Employer's illegal discharge of Young, Yarbrough Sr.'s termination is illegal regardless of whether it is viewed as a quit or a constructive discharge. Thus, the record reveals that Young and Yarbrough Sr. worked as a team and that without Young there was no work for Yarbrough Sr. As Yarbrough Sr. testified, "Since [Young] was my welder I would have no job as a helper. Without a welder you don't have a job as a helper . . . . A man has sense enough to know if you don't have a welder, then you don't have a job." When Sadler forced Young to quit his employment and then stated to Yarbrough Sr., "I guess you'll be going too," Sadler must have known that Yarbrough Sr., like Young, would reluctantly terminate his employment. Under these circumstances, where, as here, Yarbrough Sr.'s termination would not have occurred but for Young's illegal discharge, Yarbrough Sr.'s termination also violated Sec. 8(a)(2) and (1) of the Act. See *N.L.R.B.* v. *Rich's Precision Foundry*, 667 F.2d 613 (7th Cir. 1981).

Daniell if they were members of Local 211 and whether they were afraid of the Unions. Sadler explained to Young and Daniell that his reason for asking these questions was that he had heard that some of the employees were union members and that he thought the Unions would picket the project and he wanted to know where Young and Daniell stood. On March 2 Sadler asked employee Young whether he had a Local 798 book in his pocket and asked him why he had crossed the Union's picket line. Sadler also asked employee Yarbrough Sr. whether he had signed a union authorization card. The record reveals no justification for the above-described interrogation of employees Young, Daniell, and Yarbrough Sr. about their union sentiments and activities.[15] Moreover, the interrogation took place in the context of Respondent Employer's layoff and discharge of employees for engaging in union activities. In view of these circumstances I find that by virtue of Sadler's above-described conduct Respondent Employer violated Section 8(a)(1) of the Act by interrogating employees about their union sentiments and activities.

3. Case 17-CA-10306

The complaint in the above-captioned case alleges that Respondent Employer violated Section 8(a)(3) and (1) of the Act by discharging employee Steve Treadwell. The only testimonial evidence presented by the General Counsel in support of this allegation was employee Daniell's undenied testimony that on February 16, before the employees started work, Daniell was talking with several employees when Treadwell drove into the company parking lot. Preston Neal, one of the employees who was talking with Daniell, upon observing Treadwell drive into the lot, asked Daniell who he was. When Daniell identified Treadwell, Neal pointed him out to Pipe Foreman Eddy and informed Eddy, "he's got a 798 book in his pocket, if you don't want any trouble, you better then sure enough test him."[16] Eddy answered, "I will see what I can do about it." This testimony, by itself or when considered in the light of the whole record, is insufficient to establish that Treadwell was discharged or that he was discharged because of his union membership or activities.

Treadwell, who submitted an affidavit to the Board on April 8, died sometime between that date and December 9. On December 9 counsel for the General Counsel notified Respondent Employer's counsel that because Treadwell had died that the General Counsel intended to offer his affidavit into evidence pursuant to Rule 804(b)(5) of the Federal Rules of Evidence. The General Counsel did not provide Respondent Employer's counsel with a copy of the affidavit or otherwise notify him about the contents of the affidavit until December 15, the date of the hearing in this case, at which time counsel for the General Counsel, in support of this allegation, offered Treadwell's affidavit into evidence. Respondent Employer's counsel urged that the affidavit was inadmissible hearsay under the Federal Rules of Evidence and should not be received by the Administrative Law Judge. I reserved ruling.

Counsel for the General Counsel offered Treadwell's affidavit into evidence pursuant to Rule 804(b)(5) of the Federal Rules of Evidence.[17] Rule 804(b)(5) represents the 1975 codification of the common law "residual" exception to the hearsay rule; under the residual exception, hearsay statements may be judicially admissible even though they do not meet any of the several specific exceptions to the hearsay rule. See Sen. Rept. No. 93-1277, 93d Cong. 2d sess. 19, citing *Dallas County* v. *Commercial Union Assurance Co.*, 286 F.2d 388, 396-397 (5th Cir. 1961). 11 Moore's Federal Practice, Section 803(24) [7] (p. VIII-203). Pursuant to Rule 804(b)(5) hearsay is admissible if it possesses circumstantial guarantees of trustworthiness, and if its probative equivalent cannot otherwise be secured through the reasonable effort of the proponent. See *Dallas County* v. *Commercial Union Assurance Co., supra.* In addition, two other requirements are expressed by Rule 804(b)(5): (1) Admission of the proffered hearsay must serve "the general purpose of [the Rules of Evidence] and the interests of justice"; and (2) the proponent must notify the adverse party in advance of trial of his intention to offer the hearsay statement *and* "the particulars of it."

In the instant case counsel for the General Counsel did not offer "the particulars" of Treadwell's affidavit to Respondent Employer's counsel until the day of the hearing when, for the first time, counsel was furnished with a

[15] Insofar as Sadler, through his February 20 questioning, was attempting to ascertain the strike intentions of employees Young and Daniell, the interrogation was impermissible because the record fails to establish that at the time the questions were asked that Sadler had a reasonable basis to fear an imminent strike. Also, the questioning took place in the context of Respondent Employer's other coercive conduct, the layoff and discharge of employees because of their union activities. See *Mosher Steel Company*, 220 NLRB 336 (1975).

[16] The record shows that all welders, before they are hired by Respondent Employer, must be tested.

[17] Rule 804(b)(5) states:

> Rule 804. Hearsay Exceptions: Declarant Unavailable
>
> (a) Definition of unavailability—"Unavailability as a witness" includes situations in which the declarant—
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> • • • • •
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process of other reasonable means.
>
> • • • • •
>
> (b) Hearsay exceptions—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony . . . .
>
> (2) Statement under belief of impending death . . . .
>
> (3) Statement against interest . . . .
>
> (4) Statement of personal or family history . . . .
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

copy of the affidavit. Counsel for the General Counsel argues that counsel for Respondent was not prejudiced by the General Counsel's failure to supply a copy of the affidavit prior to the day of the hearing inasmuch as Respondent Employer did not call one witnesss. I disagree. It is sheer conjecture whether Respondent Employer would or would not have called any witnesses in connection with Treadwell's alleged discharge if Respondent Employer's counsel had been afforded an opportunity to read the affidavit sufficiently in advance of the hearing. I am not willing to presume that if Rule 804(b)(5) had been complied with that Respondent Employer would not have defended against the material contained in Treadwell's affidavit by either calling witnesses and/or by cross-examining the witnesses called by the General Counsel.

I reject the General Counsel's offer of the Treadwell affidavit for the reason that by failing to make the particulars of the affidavit known to Respondent Employer sufficiently in advance of the hearing herein, its admissibility does not meet the standards of admissibility set forth in Rule 804(b)(5).[18] In concluding that Treadwell's affidavit was inadmissible I have taken into consideration those cases which indicate that the Board may, under certain circumstances, exercise discretion applying the Rules of Evidence governing Federal District Court proceedings, including those governing admission of hearsay evidence. See, for example, *N.L.R.B.* v. *Capitol Fish Co.*, 294 F.2d 868, 872 (7th Cir. 1961); *Teamsters Local Union 769* v. *N.L.R.B.*, 532 F.2d 1385, 1392 (D.C. Cir. 1976); *N.L.R.B.* v. *Addison Shoe Corp.*, 450 F.2d 115, 117 (8th Cir. 1971). See also *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155 (1941). However, the circumstances of this case do not warrant a more liberal approach to the admissibility of the hearsay evidence herein than is mandated by the Federal Rules of Evidence.

Based upon the foregoing, I shall recommend that the allegation of the complaint concerning Treadwell's discharge be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union and each of the Charging Party Unions herein are labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing Respondent Union and by executing a collective-bargaining agreement with Respondent Union which contains union-security and dues-checkoff provisions, at a time when a question concerning the representation of its employees existed, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act.

4. By accepting recognition from Respondent Employer and by entering into a collective-bargaining agreement containing union-security and dues-checkoff provisions with the Respondent Employer, at a time when a question concerning representation of Respondent Employer's employees existed, Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. By laying off employees Claude Daniell, Jerry Young, John L. Yarbrough, John Glenn Yarbrough, and James W. Yarbrough on February 21, 1981, and discharging them on March 2, 1981, because of their union activities and sentiments, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. By engaging in surveillance of its employees' union activities and by interrogating its employees about their union sentiments and activities, Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I have found that Respondent Employer recognized Respondent Union and thereafter entered into an agreement with it on March 7, 1981, all during the pendency of a question concerning the representation of the employees covered thereby. By such conduct Respondent Employer has violated Section 8(a)(2) and (1) of the Act. In order to dissipate the effect of Respondent Employer's unfair labor practices, I shall order Respondent Employer to withdraw and withhold all recognition from Respondent Union and to cease giving effect to the aforementioned agreement, or to any renewal, modification, or extension thereof, until such time as Respondent Union shall have been certified by the Board as the exclusive representative of the employees in question.

Having found the recognition of Respondent Union by Respondent Employer to have been invalid and the collective-bargaining agreement containing union-security and dues-checkoff provisions to be in violation of Section 8(a)(1) and (3) of the Act, I shall order Respondent Employer jointly and severally with Respondent Union to reimburse all present and former employees, except those who joined or signed authorization cards for Respondent Union prior to the execution of the collective-bargaining agreement on March 7, 1981, for moneys paid by or withheld from them on or after March 7, 1981, for initiation fees, dues, or other obligations of membership in Respondent Union, with interest thereon computed in the manner provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).

I have also found that Respondent Union accepted recognition and thereafter on March 7, 1981, entered into a collective-bargaining agreement containing union-secu-

[18] *Justak Brothers and Company*, 253 NLRB 1054, 1080 (1981), enfd. 108 LRRM 2178, 3183-84 (7th Cir. 1981), relied on by the General Counsel is distinguishable. There, the General Counsel did not know until after the trial began that the affiant was unavailable and he notified company counsel of his intent to introduce the affidavit and gave him a copy of it 3 days in advance of seeking its admission into evidence, thereby satisfying the notice requirements under Rule 804. Here, the hearing lasted only 1 day. The General Counsel made no suggestion that the hearing be adjourned in order to give Respondent Employer's counsel a sufficient opportunity to digest the materials contained in the affidavit, consult his client about these matters, and decide what, if any, evidence to present to controvert the materials contained in the affidavit.

rity and dues-checkoff provisions with Respondent Employer at a time when there existed a question concerning representation of the employees covered thereby. By such conduct Respondent Union violated Section 8(b)(1)(A) and (2) of the Act. In order to dissipate the effect of Respondent Union's unfair labor practices, I shall order Respondent Union to cease maintaining or giving effect to its current collective-bargaining agreement with Respondent Employer or any renewal or extension thereof, until such time as the Respondent Union shall have been certified by the Board as the exclusive representative of the employees in question. In addition, I shall order that Respondent Union jointly and severally with Respondent Employer reimburse all present and former employees in the manner and to the extent set forth above.

Having found that Respondent Employer's layoff of employees Claude Daniell, Jerry Young, John L. Yarbrough, John Glenn Yarbrough, and James W. Yarbrough on February 21, 1981, and their discharge by Respondent Employer on March 2, 1981, violated Section 8(a)(3) and (1) of the Act, I shall order that Respondent Employer offer reinstatement to each of them to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and that they each be made whole for any loss of earnings or other benefits suffered by them as a result of the discrimination against them, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[19]

The Respondent Employer, Great Southern Construction, Inc., Wellington, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Operating Engineers Local Unions 101 and 627, Pipeliners Local Union 798 and Laborers Local Union 1290, or in any other labor organization of its employees, by laying off or discharging employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(b) Engaging in surveillance of its employees' union activities.

(c) Interrogating its employees about their union membership or activities.

(d) Assisting or contributing support of the Off-Shore Drilling & Allied Workers, National Maritime Union of America, AFL-CIO, by recognizing this labor organization as the exclusive representative of any of its employees for the purpose of collective bargaining at at time when a question concerning representation exists.

(e) Giving effect to or enforcing the collective-bargaining agreement executed with Respondent Union on March 7, 1981, or to any modification, extension, renewal, or supplement thereto, unless and until Respondent Union has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees; provided, however, that nothing herein shall require Respondent Employer to vary or abandon any existing term or condition of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Claude Daniell, Jerry Young, John L. Yarbrough, John Glenn Yarbrough, and James W. Yarbrough immediate and full reinstatement to their former positions or, if such positions do not exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Withdraw and withhold all recognition from the Off-Shore Drilling & Allied Workers, National Maritime Union of America, AFL-CIO, as a representative of its employees for the purpose of collective bargaining unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(c) Jointly and severally with Respondent Union reimburse all present and former employees for all initiation fees, dues, and other moneys, if any, paid by or withheld from them in the manner provided in "The Remedy" section of this Decision.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of moneys due under the terms of this Order.

(e) Post at its place of business in Wellington, Kansas, copies of the attached notice marked "Appendix A."[20] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent Employer representative, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

[19] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[20] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) In the event that it is no longer in business in Wellington, Kansas, Respondent Employer shall mail a copy of "Appendix A" to all individuals who were construction employees of Respondent Employer between February 21, 1981, and the date that Respondent Employer ceased operating in Wellington, Kansas. Copies of said Appendix, on forms provided by the Regional Director for Region 17, after being duly signed by an authorized representative of Respondent Employer, shall be mailed immediately upon receipt thereof as herein directed.

(g) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[Section B of the recommended Order omitted from publication.]